Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1978

No. 78- 78-791

MARVIN GREENBLATT,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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November 13, 1978

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Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

The Petitioner, Marvin Greenblatt, respectfully prays that a Writ of Certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the Third Circuit entered in this proceeding on August 14, 1978, and the Order Denying the Petition for Rehearing entered by that Court on October 13, 1978.

OPINIONS BELOW.

The opinion of the Court of Appeals, and the Order denying the Petition for Rehearing, not yet reported, both appear in the Appendix hereto (App., pp. A3-A27).

JURISDICTION.

The judgment of the Court of Appeals for the Third Circuit was entered on August 13, 1978. The Order denying the Petition for Rehearing was entered on October 13, 1978. This Petition was filed within 30 days of the latter date. The Court's jurisdiction is invoked under 28 U. S. C. § 1254(1).

QUESTION PRESENTED.

Did the Court err in holding that the evidence presented at trial was sufficient to establish that the mailing alleged in Count Nine of the Indictment was utilized for the purpose of executing an artifice or scheme to defraud?

STATUTE INVOLVED.

18 U. S. C. § 1341.

STATEMENT OF THE CASE.

This Writ arises from the opinion and judgment of the United States Court of Appeals for the Third Circuit affirming the judgment of the United States District Court of the Eastern District of Pennsylvania in favor of the Respondent and against the Petitioner (Docket No. 77-100-2), and from the subsequent Order entered denying the Petition for Rehearing.

Petitioner was tried before the District Court and a jury upon an indictment charging Collection of Extensions of Credit by Extortionate Means in Counts One and Two, Mail Fraud in Counts Three through Twelve, and Racketeer Influenced and Corrupt Organizations in Counts Thirteen and Fourteen.

The trial resulted in the conviction of Petitioner on Counts One, Two, Five, Six, Nine, Thirteen and Fourteen. All other Counts were dismissed by the District Court.

Petitioner appealed to the United States Court of Appeals for the Third Circuit, inter alia, that the Respondent failed as a matter of law, and through insufficient evidence, to establish that the mailings alleged in Counts Five, Six and Nine were utilized for the purpose of executing a scheme or artifice to defraud and further, if these convictions on the mail fraud counts were reversed, Counts Thirteen and Fourteen charging Racketeer Influenced and Corrupt Organizations must be reversed as a matter of law. The Court held that there was insufficient evidence to establish that the mailings alleged in Counts Five and Six were for the purpose of executing the scheme to defraud (App., pp. A13-A16) and reversed the judgment of conviction on these two counts. In light of this, it also reversed the judgment of conviction on Counts Thirteen and Fourteen, the racketeering counts (App., pp. A22-A24). However, regarding Count Nine, the Court held there was sufficient evidence for the jury to have found "beyond a reasonable doubt that the April 10 request for financing was closely connected with the fraud so as to constitute mail fraud". (App., p. A21), and further, that the mailings were "for the purpose of executing the fraud". (App., p. A21).

Subsequently, Petitioner filed a Petition for Rehearing with the Court on its decision regarding Count Nine for mail fraud, alleging that the Court misapprehended a material fact upon which it placed substantial reliance in its opinion regarding Count Nine and in light of this, the Court's analysis and application of *United States v. Tarnopol*, 561 F. 2d 466 (3d Cir. 1977) was improper and incorrect. The Court denied Petitioner's Petition for Rehearing (App., p. A27).

It is from these rulings that this Petition ensues.

ARGUMENT.

The Evidence Presented at Trial Was Insufficient as a Matter of Law to Establish That the Mailing Alleged in Count Nine Was Utilized for the Purpose of Executing an Artifice or Scheme to Defraud.

Petitioner, the former president of Chestnut Hill Lincoln Mercury was charged in Count Nine of the Indictment with having used the mails for the purpose of executing a scheme or artifice to defraud Ford Motor Credit Company, a Ford subsidiary, which finances new and used cars for dealers. It further charged that the Petitioner devised a scheme to obtain new and used car inventory under Ford's "floor plan" financing, to sell the cars for cash, and to abscond with the cash under the guise of a robbery. The sales and alleged robbery occurred on April 16, 1975 which resulted in a loss of $175,000. Ford was alleged to be the victim of the scheme to defraud.

Ford Motor Credit Company extends lines of credit to Lincoln Mercury dealers and buys acceptable installment contracts from those dealers (N. T. 213). A line of credit is called a floor plan (N. T. 213) because the Ford Motor Credit Company, who pays Ford for each car ordered by a dealer has a security interest in each car financed by the dealer (N. T. 214).

Used cars may also be floor planned, at 80 percent of their wholesale value (N. T. 214). Chestnut Hill Lincoln Mercury had a used car credit line of $50,000 under the floor plan (N. T. 214). With regard to the floor planning of used cars, as pertains to the case at bar, a dealer with a line of credit could draw on the line by preparing a Wholesale Security Agreement (N. T. 222). The dealer would normally be extended 80 percent of the wholesale value of the automobile. Generally, the dealer would be advanced funds if the amount assigned was correct and the dealer showed title to the car.

With respect to Chestnut Hill Lincoln Mercury, the Petitioner signed the agreements and they would be either mailed to the Company's King of Prussia office or picked up at the dealership by a Ford Motor Credit Company employee in the area.

Chestnut Hill Lincoln Mercury, for approximately the year and a half preceding the robbery, applied for wholesale financing under the used car floor plan at least on the average of once or twice per month. The testimony established that applications were made periodically, and frequently (N. T. 241). Indeed, when asked by Mr. Kidd, defense counsel, whether the request for financing of April 10, 1977 was unusual, Howard Stoneback, Branch Manager for Ford Motor Credit Company responded that they were not (N. T. 242).

The Wholesale Security Agreement, which was the subject of the Count Nine mailing served as a regular credit application for five automobiles, three of which were sold on the day of the robbery (N. T. 243). On the day of the robbery eight used cars of the twenty sold to Integrity Autos were floor planned, the remaining five cars being floor planned at various times from January, 1975 (N. T. 242, 243).

With respect to the form at issue in Count Nine, Mr. Stoneback explained the working of the Wholesale Security Agreement in response to Mr. Kidd's questions, leaving little doubt that the mailing at issue was of a routine business form. At page 245, the following dialogue took place:

> "Mr. Stoneback: Okay. We, in the branch, receive a wholesale security agreement from the dealer. We verify that the dealer owns the vehicle, and when

everything is in line we cut a check. Now the copies of the check and media to support the payment—and the media would be a copy of the Wholesale Security Agreement—are attached to the daily cash report and this goes with all of the checks that are cut from the branch office that day, and it has to account for all of the receipts in the branch office that day . . . That is what triggers a trust receipt being printed from Dearborn and mailed to each dealer, sir.

Mr. Kidd: Thank you, sir. It helps me understand the transaction. But am I correct in characterizing this as being a *normal weekly transaction* which comes from Dearborn, Michigan? (Emphasis added.)

Mr. Stoneback: Yes, Sir.

Mr. Kidd: And the fact that the automotive wholesale plan weekly transaction register dated 4/19/75 was not an unusual occurrence that that weekly transaction report would be received by Chestnut Hill Lincoln Mercury? In fact it was a—let me rephrase that to make it more simple, if possible.

Wasn't it routine for Chestnut Hill Lincoln Mercury to receive the automotive wholesale plan dated 4/19/75?

Mr. Stoneback: Would you please rephrase the question, please?

Mr. Kidd: All right. Wasn't it in the normal course of business that the weekly transaction register was received by Chestnut Hill Lincoln Mercury, routinely, on or before April 19, 1975?

Mr. Stoneback: These would be sent to each and every dealer every week and in this instance they would have started sometime in July of 1970.

Mr. Kidd: So that it is fair for me to state that such a weekly transaction register was going to Chestnut Hill Lincoln Mercury for a period of approximately several years.

Mr. Stoneback: Yes, Sir."

It is the mailing of documents identical to those in the Count Nine mailing which initiated the routine explained above.

The mailing at issue alleged in the Indictment, by the Government, defense counsel, the trial court and the Court of Appeals was not, in fact, the actual mailing which did occur. All of the above parties have uniformly assumed the Count Nine mailing was from Chestnut Hill Lincoln Mercury to the Ford Motor Credit Company branch at King of Prussia, initiating financing. However, as set forth in the Petition for Rehearing, the evidence was that the mailing was *from* Ford Credit *to* Chestnut Hill. The mailing (Government Exhibit G-27(d)) was a "Request for Wholesale Financing and Assignment of Interest." The only evidence adduced at trial of that mailing was by Stipulation. The stipulation was that the Request for Wholesale Financing and Assignment of Interest was sent on or about April 9, 1975 *from* Dearborn, Michigan to Chestnut Hill Lincoln Mercury. Indeed, at Notes, page 575, the stipulation is: "If called to testify, Raymond Seyferth of the Ford Motor Credit Company, Dearborn, Michigan, would testify that Government Exhibit 27(d) being a request for wholesale financing and assignment of interest was mailed on or about April 9, 1975 *from Dearborn, Michigan to Chestnut Hill Lincoln Mercury, Inc., 7700 Germantown Avenue, Philadelphia, Pennsylvania through the United States Postal Service.*"

The Request for Wholesale Financing and Assignment of Interest, regarding used cars, was routinely delivered to

the Ford Credit Branch at King of Prussia, Pennsylvania, where a check to the dealer is drawn. The request is then delivered to the main office of Ford Credit at Dearborn, Michigan, where it is ultimately processed and mailed back to the dealer (N. T. p. 244).

Consequently, the mailing alleged in Count Nine being from Dearborn to Chestnut Hill, was made *after* the check had been drawn and was merely a confirmatory memorandum. Even though the stipulation is that the mailing occurred on April 9, 1975, an examination of the document (Government Exhibit G-27(d)) would indicate that the mailing was after April 10, 1975 because the document discloses that the check was issued on April 10, 1975. Since this information was already on the document, it could not have been mailed until after, at least, April 10, 1975.[1]

Counsel for Petitioner, counsel for the Government, the trial court, indeed the Third Circuit Court, had all misconstrued this absolutely critical fact. In Petitioner's brief in this case, indeed, throughout the entire history of argument regarding Count Nine, the Petitioner assumed that the Count Nine mailing was from Chestnut Hill Lincoln Mercury to the Ford Motor Company. For example, the following statements were made by Petitioner in his brief to the Third Circuit:

> "The count [IX] charges the mail fraud arose from an April 10, 1975 *mailing* of a request for wholesale financing *to Ford Motor Credit Company* to cover financing of used vehicles in the inventory of Chestnut Hill Lincoln Mercury." (Emphasis added.) (Petitioner's brief, p. 44.)

1. The record is silent regarding the basis of the stipulation. Evidently, however, the date of the stipulation was obviously incorrect and indeed the document could not have been mailed from Dearborn until subsequent to April 9, 1975.

> "The theory of the government's prosecution was that *when he caused the request for wholesale financing to be mailed*, Mr. Greenblatt knew some of the cars covered by the form would be sold and the proceeds diverted to him. *The form was placed in the mail* on April 10, 1975 while the scheme reached fruition, not earlier than April 16, 1975." (Emphasis added.) (Petitioner's brief, p. 45.)

> "Indeed, even if the scheme had begun, clearly the manner in which the financing form was conveyed to Ford was wholly irrelevant and immaterial. Had Greenblatt handed the form to Ford's representative, there would be no prosecution for the robbery. Thus, the instant prosecution turns on the entirely fortuitous chance that the application made on April 9 happened to have been mailed." (Petitioner's brief, p. 53.)

The Government was similarly mistaken. At page 11 of its brief it stated: "Three of the cars had been placed on the floor plan pursuant to a request for wholesale financing mailed *from* Chestnut Hill on April 10, 1975." (N. T. 242-243). This mailing formed the basis for the offense charged in Count Nine of the Indictment, the Government's theory being that the "robbery", which was never solved, never occurred and that the Petitioner had defrauded the Ford Motor Credit Company of the missing money.

The trial court was similarly mistaken. During its charge (N. T. 175), the Court stated:

> "Obviously, if the arrangements had been made before the Defendants concocted any scheme to commit a false robbery, the mailing could not have been in furtherance of the scheme. So you will have to decide, members of the jury, leaving aside for the mo-

ment whether there was a scheme to commit a robbery, assuming for the moment that there was a scheme to commit a robbery—you will have to decide whether that scheme had been concocted prior to *April 10, 1975, when the application for wholesale financing of the used cars was mailed.*" (Emphasis added.)

The Indictment, itself, reflected this incorrect statement of the evidence. Count Nine charged that:

"[O]n or about April 10, 1975 . . . Marvin Greenblatt . . . for the purpose of executing the aforesaid scheme and artifice [to defraud Ford Motor Company] and attempting to do so did knowingly cause to be placed in an authorized depository for mail a copy of Chestnut Hill Lincoln Mercury's request for wholesale financing from Ford Motor Credit Company to cover financing of used vehicles Chestnut Hill Lincoln Mercury was holding for re-sale, to be delivered *by mail to DPC-Ford Credit Company, P. O. Box 1785, Dearborn, Michigan.*" (Emphasis added.)

As a result of the critical oversight of all counsel and the trial court, the Third Circuit also assumed a mailing wholly unsupported, indeed, contrary to all evidence. That Court stated: "The scheme charged in Count Nine involved the request for wholesale financing on April 10, 1975 to Ford Motor Credit Company." (App., p. A17).

Consequently, all persons concerned have assumed the request was mailed from Chestnut Hill on April 10, 1975 and was to get money for cars listed thereon. However, the only evidence of any mailing of that form was from Ford (Dearborn) to Chestnut Hill. Therefore, the original delivery of the request to Ford Credit at King of Prussia

must have occurred by messenger on or about April 9 or 10, 1975.

In the Third Circuit Court's opinion, the mailing of the request to Ford (King of Prussia) would have constituted mail fraud so long as it occurred after the fraud originated. However, there is absolutely no evidence of record that the request was mailed, or indeed, whether it was mailed at all, to Ford Credit at King of Prussia. Mr. Stoneback's testimony only indicated that the agreement was "sent" not mailed (N. T. 245). The mailing in evidence was of the processed request back to Chestnut Hill, which occurred considerably subsequent to the issuance of the check to Chestnut Hill, i.e., apparently after the check was received and deposited to Chestnut Hill's corporate account. The Third Circuit conceded, if the scheme did not begin until after the April 10 mailing, the mail fraud conviction would have to be reversed (App., p. A17). Moreover, the mailing was only in the nature of a confirmation and had no part whatsoever in obtaining the money. Finally, in light of these new facts concerning the mailing, it must be construed as a weekly, routine procedure always followed by Ford Credit and hence falls squarely within *United States v. Tarnopol*, 561 F. 2d 466 (3rd Cir. 1977).

Accordingly, the mailing from Ford Motor Credit Company to Chestnut Hill was only remotely related to the scheme to defraud and, moreover, was contrary to Count Nine of the Indictment. Thus, the Third Circuit Court in its opinion, relied upon an erroneous material fact not in evidence, to the effect that the Petitioner, Greenblatt, mailed an application for wholesale financing to Ford Motor Credit Company, when in fact the evidence was to the contrary in that the mailing was from Ford Motor Credit Company to Chestnut Hill.

If it is recognized that the Count Nine mailing was from Dearborn to Chestnut Hill, the mailing clearly was

after the funds had been released and could not have been for the purpose of executing the scheme.

However, even if the sequential considerations are ignored, the mailing clearly falls within the "normal business routine" mailings which have been excluded from mail fraud prosecution, or at least the mailing would not have been sufficiently closely related to the scheme to warrant Federal prosecution.

Prior to *Tarnopol, supra,* courts carefully avoided Federal jurisdiction turning on the merely fortuitous event of some routine mailing by requiring that the use of the mails materially promote the scheme. *Pereira v. United States,* 347 U. S. 1 (1954); *Kann v. United States,* 323 U. S. 88 (1944); *Parr v. United States,* 363 U. S. 370 (1960); *United States v. Sampson,* 371 U. S. 75 (1962); *United States v. Maze,* 468 F. 2d 529 (6th Cir. 1972), *aff'd,* 414 U. S. 395 (1974). The underlying requirement framed by these cases is that the use of the mails plays a significant part in the scheme and not merely serves as a technicality upon which Federal jurisdiction may be asserted. Unlike typical mail frauds wherein the mails are used for dissemination of false financial information to stockholders, numerous applications for phony insurance coverage, fraudulent land sales by mail or the like, where the defendants used the mails as a vehicle for mass circulation critical to the promotion of the scheme, the mailing in this case was merely incidental to the scheme. Indeed, the weekly transaction register "would be sent to each and every dealer every week. . . ." (N. T. p. 245).

In *Parr v. United States, supra,* the legally required routine mailing of a standard business form, even if involved in a scheme, was not sufficient to bring the act within the mail fraud statute. In *Parr,* receipts from taxpayers, in ordinary course, provided the flow that funded

the scheme, and the mailing of payments and routine tax statements served as a basis of counts in the indictment. The Court reversed the mail fraud counts holding that the statute does not reach cases wherein the taxing authority was legally required to assess and collect taxes, and the authority used the mails for taxing purposes. The clear sounding of the *Parr* holding was that where the use of the mails was not "incident to an essential part of the scheme", such use does not fall within the statute. At p. 390. *Tarnopol* extended the reasoning in *Parr* to include standard and routine, if not legally required mailings, and established the standard to be the proximity of the mailing to the scheme.

Prior to *Tarnopol, supra,* the *Parr* rationale was first extended to routine business transactions in *United States v. Brickey,* 296 F. Supp. 742 (E. D. Ark. 1969). In *Brickey,* the chief executive officer of an insurance company engaged in an elaborate scheme to divert the company's assets. All but two of the 28 counts in the Indictment involved routine mailings to and from the insurance company. The Court dismissed all counts involving such mailings holding that there must be a sufficient connection between the use of the mails and the scheme. The Court stated at page 748:

> "Regardless of the particular language that a particular count may use in describing the necessary connection between the fraud and the use of the mails, it seems clear in the context of a criminal prosecution that the connection must be real and proximate, not merely abstract or remote."

The *Brickey* decision preceded *Maze,* which in effect, adopted its reasoning. *Maze* emphasized the requirement that the mailing be "sufficiently closely related to the

scheme to bring [defendant's] conduct within the statute," at p. 399. It is submitted that the *Maze* requirement is a fundamental restriction to limit what would otherwise be a fortuitous chance that the mails were involved, albeit remotely, in a scheme and hence prevent Federal jurisdiction from turning on the mere chance of a mailing. The clear sounding of *Maze* is that a Federal mail fraud prosecution must involve the abuse of the mails, a sufficient abuse to prompt Congressional concern. "Congress could have drafted the mail fraud statute so as to require only that the mails be in fact used as a result of the fraudulent scheme. But it did not do this; instead, it required that the use of the mails be for the purpose of executing such scheme or artifice." *Maze, supra,* at p. 405. [Footnotes omitted.]

A decision handed down after *Maze* which concerned mail fraud prosecution arising from routine mailings incidentally relating to a scheme was *United States v. Staszcuk,* 502 F. 2d 875 (7th Cir. 1974), modified on other grounds, 517 F. 2d 53 cert. denied, 96 S. Ct. 65 (1975), wherein form notices were caused to be mailed by the defendants regarding zoning changes. The role of the notices was to advise of public hearings, which had little effect on the changes, or on the scheme. The Court carefully considered the *Maze* decision as well as many of the same arguments raised herein. It concluded that unless a mailing is "a step forward in receipt of the fruits of the scheme . . ." Federal prosecution will not lie. At p. 880. The Court in *Staszcuk* carefully considered the part played by the mailings in the scheme and although the mailings did contribute somewhat, the requisite nexus was lacking. The reasoning of that Court is applicable hereto, because the return of the Request for Wholesale Financing was entirely immaterial to the success of the scheme. Indeed, the manner in which the processed financing form was conveyed to

Chestnut Hill from Ford was wholly irrelevant and immaterial. The instant prosecution turns on the entirely inconsequential mailing of what is equivalent to a confirmatory memorandum.

Finally, this Third Circuit's recent decision in *United States v. Tarnopol, supra,* regarding routine mailings is clearly dispositive of this issue as set forth more fully in detail above. Certainly, the mailing here, as shown by the evidence, was "intrinsically legitimate" and, indeed, "necessary" for Ford Motor Credit Company to do business with its dealers. Even if, as the Court in *Tarnopol* noted, the mailing of the application "facilitated" securing the monies which were the object of the scheme to defraud Ford (which it did not), it is clear that it was not sufficiently closely related to the scheme to support a mail fraud prosecution.

CONCLUSION.

For these reasons, a Writ of Certiorari should be issued to review the Judgment and Opinion of the Third Circuit.

Respectfully submitted,

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November 13, 1978

Appendix.

JUDGMENT AND PROBATION/COMMITMENT ORDER.

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Docket No. 77-100-2

UNITED STATES OF AMERICA,

v.

MARVIN GREENBLATT,
Defendant.

In the presence of the attorney for the government the defendant appeared in person with counsel Ronald Kidd, Esq., on this date, July 29th, 1977.

There being a verdict of GUILTY.

Defendant has been convicted as charged of the offense(s) of collection of an extension of credit by extortionate means, mail fraud and acts of racketeer influenced and corrupt organization, as charged in Counts 1, 2, 5, 6, 9, 13 and 14. The defendant is continued on bail pending appeal.

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney Gen-

eral or his authorized representative for imprisonment for a period of two (2) years, subject to the provisions of Title 18 § 4205(b)(2), said sentence to run concurrently as to each of Counts 1, 2, 5, 6, 9, 13 and 14.

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

The court orders commitment to the custody of the Attorney General and recommends,

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U. S. Marshall or other qualified officer.

/s/ ALFRED L. LUONGO
Alfred L. Luongo
U. S. District Judge

Date July 29, 1977

OPINION OF THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 77-2082

UNITED STATES OF AMERICA,
Appellee,

v.

BROWN, FRANCIS HARRY aka Harry Brown,
Appellant.

No. 77-2083

UNITED STATES OF AMERICA,
Appellee,

v.

GREENBLATT, MARVIN,
Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Crim. Nos. 77-100-1 and 77-100-2

Argued June 8, 1978

Before ROSENN, HUNTER and HIGGINBOTHAM,
Circuit Judges

(Opinion filed August 14, 1978)

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OPINION

HUNTER, *Circuit Judge:*

Francis Harry Brown and Marvin Greenblatt appeal their convictions for using extortionate means to collect credit (Count 1); for conspiracy (Count 2); for mail fraud (Counts 5, 6, and 9); for conducting the affairs of an enterprise affecting interstate commerce through a pattern of racketeering activity (Count 13); and for conspiracy to commit that offense (Count 14). While appellants have raised several arguments, we find merit only in the contention that the government failed to prove mail fraud under Counts 5 and 6 of the indictment. Our disposition of those counts also requires reversal of the interrelated racketeering counts. We affirm as to remaining counts.

I

The charges against appellants arose from their management of the Chestnut Hill Lincoln-Mercury car dealership (Chestnut Hill) in Philadelphia between March 1972 and April 1975. During that time, Greenblatt was president of Chestnut Hill, and Brown was the dealership's general manager. Counts 1 and 2 of the indictment involved a charge that appellants extorted the repayment of a loan from Russell Wilmerton. Counts 3 through 12 charged Greenblatt and Brown with various acts of mail fraud. Counts 13 and 14 related to the operation of Chestnut Hill through a pattern of racketeering activity. Counts 15 and 16 charged appellant Brown only with criminal violations arising from the alleged misuse of an American Express credit card. Certain of the mail fraud counts—3, 4, 7, 8, 10, 11 and 12—were dismissed by the trial judge on defendants' motion for acquittal before the case went to the jury.[1] Counts 15 and 16 were severed before trial began and were dismissed with prejudice before this appeal was filed. The jury found both appellants guilty on the remaining counts—1, 2, 5, 6, 9, 13 and 14. Brown was sentenced to concurrent terms of three-years' imprisonment, and Greenblatt to concurrent terms of two-years' imprisonment.[2]

We review the facts of the case as they appear from the evidence in the light most favorable to the government. *See Glasser v. United States,* 315 U.S. 60, 80 (1942).

---

1. Appellants' co-defendant, Herbert Keller, was charged in four of the mail fraud counts. All charges against Keller were dismissed by the district court.

2. Since we find that the defendants' conviction under Counts 1, 2 and 9 should be affirmed, and since defendants were both sentenced to concurrent prison terms on all counts, we note that we have discretion not to review the remaining counts under the concurrent sentence doctrine. United States v. Lampley, 573 F. 2d 783, 790-91 (3d Cir. 1978). Nevertheless, we believe that resolution of the remaining issues in this case is appropriate. *See* United States v. Maze, 414 U. S. 395, 397 n. 1 (1974); United States v. Keller, 512 F. 2d 182, 185 n. 8 (3d Cir. 1975).

Counts 1 and 2. Count 1 charged Brown and Greenblatt with using extortion to collect a debt in violation of 18 U. S. C. § 894.[3] Count 2 charged both defendants with conspiracy in relation to this substantive offense, *id.* § 371. Russell Wilmerton arranged to borrow $9000 from Brown in November 1972. He had met Brown through a David Martin in connection with a previous loan. The money was given to Wilmerton in cash. No note was signed and no collateral was given. Each week Wilmerton was to pay $405 in interest, and the principal was to be repaid in thirty days. The loan was extended once, and interest payments were made until January 1973, when a receiver was appointed for Wilmerton's company. On January 29 and 30 several threats were leveled against Wilmerton because of his failure to repay the principal of the loan. One threat was personally delivered by Greenblatt.[4] As a result of the threats, Wilmerton agreed to repay the loan.

3. 18 U. S. C. § 894(a) (1976) provides:

> (a) Whoever knowingly participates in any way, or conspires to do so, in the use of any extortionate means
>
> (1) to collect or attempt to collect any extension of credit, or
>
> (2) to punish any person for the nonrepayment thereof,
>
> shall be fined not more than $10,000 or imprisoned not more than 20 years, or both.

4. The testimony of Wilmerton and Martin indicated that they met with Brown and Greenblatt on January 29, 1973, at a shopping center. Greenblatt explained "that he was tired of [Wilmerton's] excuses" and that if a $3,000 payment was not made by the next evening Wilmerton would "get a visit from . . . some of the boys down in Philadelphia." (Testimony of Russell Wilmerton, Tr. at 850.) The next day Wilmerton told Greenblatt that he did not have the money. Wilmerton received several mysterious calls that evening. One caller stated, "O.K., Bud, get ready. We are going to play taps for you tonight." (*Id.*, Tr. at 854). Later that evening, a funeral director appeared at Wilmerton's doorstep and announced that he had been told "to pick up the body of Mr. Wilmerton." (*Id.*)

Count 5. Brown and Greenblatt were charged with mail fraud in relation to a scheme to obtain money from Herbert Bernstein by inducing him to invest in an illusory interest in the Chestnut Hill dealership. Count 5 dealt with a part of that scheme in which the two obtained the use of $6,000 in proceeds from a loan made to Bernstein by Allstate Finance Co. This transaction was in fact a "double fraud;" Count 6 charged that Allstate was defrauded as well.

The scheme began in late summer of 1974. At that time Brown convinced Bernstein to pay $20,000 towards the purchase of a portion of Brown's "interest" in Chestnut Hill. In early 1975, Bernstein gave Brown an additional $10,000 as a deposit on the purchase of Greenblatt's interest. In fact Brown never owned any interest in Chestnut Hill. Greenblatt did hold common stock, but could not sell or otherwise transfer the shares without first offering them to Ford Motor Company by the provisions of Ford's dealership-development program. Greenblatt did not give Ford the required notice and never transferred his shares.

The part of the scheme to defraud Bernstein charged in Count 5 was as follows. In early February 1975 Bernstein asked Brown to finance the purchase of a motorcycle. Brown suggested that instead of using the new motorcycle as collateral, Bernstein should use his 1974 Lincoln. The car's title was already encumbered, but the two planned to misrepresent to the finance company that the Lincoln was being purchased from Chestnut Hill. Bernstein would keep $4,500 of the $6,000 loan in order to buy the motorcycle and would lend the remaining portion to Brown. The loan was completed through Allstate Finance Company. Allstate's check was made payable to Chestnut Hill Lincoln-Mercury or Herbert Bernstein and was delivered

on February 10. Bernstein endorsed the check, but Brown took the instrument into his possession and told Bernstein he would turn over the $4,500 when the check cleared.

Brown later refused to turn over the money to Bernstein and suggested that he consider the $6,000 as an additional investment in Chestnut Hill. Bernstein, at least by March 1, 1975, considered that the money would be treated as an investment. On March 6 Allstate mailed a coupon book to Bernstein for repayment of the loan. On April 8 Bernstein returned to Allstate two payment-due notices and Allstate's request to furnish title for the 1974 Lincoln. Accompanying the return was a letter explaining that he had not purchased the car and that Allstate should look to Chestnut Hill for recovery of the money. After Allstate contacted Brown and Greenblatt, the two telephoned Bernstein. Brown promised that Bernstein would receive his $4,500. As a result, Bernstein telephoned Allstate and indicated that the letter disclaiming the loan was the result of a misunderstanding and that he would make payments on the loan.

In response to the phone call, Mr. J. A. McGrath at Allstate wrote Bernstein a letter dated April 16, 1975. The letter thanked Bernstein for his call and indicated that new payment coupons would be forwarded.[5] The mailing of this letter formed the basis of the mail fraud charged in Count 5.

Because of the failure of Bernstein or Chestnut Hill to send the car's title to Allstate and because of the apparent

5. The text of the letter was as follows:

Dear Mr. Bernstein: Thank you for your phone call. A complete set of coupons and self-addressed return envelopes will be sent to you early next week. I have enclosed a substitute first coupon since the first payment was due on March 25. Please forward to my attention in the enclosed envelope. Sincerely yours, J. A. McGrath, Consumer Finance Manager, Allstate Enterprises (Tr. at 1024).

demise of Chestnut Hill, Allstate on April 24, 1975 recovered the $6,000 from an auto repair company which had endorsed the check subsequent to Bernstein.

Count 6. Count 6 made reference to the same background facts supporting the mail fraud charged in Count 5. This count charged defendants with defrauding Allstate Finance Company in connection with the loan of $6,000 to Bernstein. The mailing charged in this count was Allstate's sending Bernstein the repayment-coupon book on March 6, 1975.

Count 9. The government charged in Count 9 that Brown and Greenblatt defrauded Ford Motor Credit Company, a Ford subsidiary which finances new and used cars for dealers. The fraud involved a false report of a "robbery" as a guise for the conversion of funds as to which Ford Credit had a security interest. The mailing which supported this count of mail fraud was a request for wholesale financing sent by defendants on April 10, 1975.

In April 1975 Chestnut Hill was in financial difficulties. On April 2 Ford Motor Credit Company informed Greenblatt that as of April 30, 1975, it would no longer provide wholesale financing of vehicles, called "floor plan" financing. Chestnut Hill's last request for wholesale financing was mailed on April 10. On Tuesday, April 15, Ford asked Greenblatt to resign as president. He said that he would resign on the following Monday.

On April 16 Chestnut Hill sold thirty-eight automobiles. The company's records show that roughly $175,000 in cash was taken in on that date.[6] Between October 1974 and March 31, 1975, the greatest amount of cash taken in during one day was approximately $18,300; only on three

6. There was evidence, however, that several buyers paid far less for the cars than was reflected in the records.

days during that period was over $10,000 in cash received. Three of the cars sold on April 16 had been placed on the "floor-plan" under the April 10 request for financing. Additionally, one buyer on April 16 paid for a car which had been sold to him for cash two days prior to the April 10 mailing.

After the dealership closed for the evening, the Philadelphia Police received a report that the agency had been robbed. Greenblatt and the dealership's sales manager told police that the robber had taken a large amount of cash. The government alleged that the "robbery" had never taken place and that defendants had taken the cash and thereby defrauded Ford Motor Credit Company.

Counts 13 and 14. Count 13 charged appellants with violation of the Racketeer Influenced and Corrupt Organizations Act.[7] The government alleged that they had conducted the affairs of an enterprise affecting interstate commerce, Chestnut Hill Lincoln-Mercury, through a pattern of racketeering activity, in violation of 18 U. S. C. § 1962 (b).[8] The racketeering activity alleged consisted of the evidence underlying the substantive count of extortion and the counts of mail fraud.[9] Count 14 charged conspiracy to commit the substantive racketeering offense, in violation of 18 U. S. C. § 1962(d).

7. 18 U. S. C. §§ 1961-1968 (1976).

8. That section provides:

> It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

9. *See id.* § 1961(1):

> "Racketeering activity" means . . .
>
> (B) any act which is indictable under any of the following provisions of title 18, United States Code: . . . sections 891-894 (relating to extortionate credit transactions), . . . section 1341 (relating to mail fraud) . . . .

II

Defendants contend that Counts 5, 6 and 9 of the indictment failed to charge and the government failed to prove the crime of mail fraud. The mail fraud statute, 18 U. S. C. § 1341, prohibits the use of the mails "for the purpose of executing" a scheme to defraud or an attempt to defraud.[10] Not every scheme which is fraudulent under state law is a mail fraud. *Parr v. United States,* 363 U. S. 370, 385 (1960); *Kann v. United States,* 323 U. S. 88, 95 (1944). "[T]he gist of the crime is the use of the mails for the purpose of executing a scheme to defraud." *United States v. Tarnopol,* 561 F. 2d 466, 471 (3d Cir. (1977). *See United States v. Maze,* 414 U. S. 395, 400 (1974).

In *United States v. Tarnopol, supra,* we surveyed the guidelines for determining whether a mailing is to be deemed "for the purpose of executing" a scheme to defraud. We described the question presented to be "whether or not the 'mailings were sufficiently closely related to respondent's scheme to bring his conduct within the statute.' *United States v. Maze,* [*supra,* 414 U. S. at

10. Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

Id. § 1341.

399]." 561 F. 2d at 471-72. The completion of the scheme must depend in some way on the mailings charged. *United States v. LaFerriere,* 546 F. 2d 182, 187 (5th Cir. 1977). Mailings taking place after the "object" of the scheme has been accomplished or before the scheme has begun are not sufficiently related to the plan to support a mail fraud conviction. 561 F. 2d at 472.

The "object" of a fraudulent scheme is not necessarily accomplished when the perpetrators of the fraud receive the fruits of their scheme. The success of some fraudulent plans may depend, for example, on the victim's continued ignorance of the fraud after he had paid over money. In some cases, "subsequent mailings . . . [are] designed to lull the victims into a false sense of security, postpone their ultimate complaint to authorities, and therefore make apprehension of the defendants less likely than if no mailings had taken place." *United States v. Maze, supra,* 414 U. S. at 403. *See United States v. Sampson,* 371 U. S. 75, 80 (1962); *United States v. LaFerriere, supra,* 546 F. 2d at 186-87. A letter to a victim may be used to aid a scheme which contemplated a series of fraudulent acts. *Kann v. United States, supra,* 323 U. S. at 94-95. In such a case, a mailing may be used to give a fraudulent business the appearance of legitimacy or otherwise to postpone inquiry and action by former victims so that the scheme may continue. *See United States v. Sampson, supra,* 371 U. S. at 80; *United States v. Serlin,* 538 F. 2d 737, 745 (7th Cir. 1976); *United States v. Marando,* 504 F. 2d 126, 129-30 (2d Cir.), *cert. denied,* 419 U. S. 1000 (1974); *United States v. Green,* 494 F. 2d 820, 825-26 (5th Cir.), *cert. denied,* 419 U. S. 1004 (1974).

Defendants argue that the mailings charged and proven under the three mail fraud counts which were submitted to the jury were not "for the purpose of executing"

the frauds alleged. We test defendants contentions not only on the basis of the indictment, but also on our consideration of the evidence adduced at trial and the instructions given to the jury. *See Parr v. United States, supra. See also United States v. Tarnopol, supra,* 561 F. 2d at 470-73; *United States v. Adamo,* 534 F. 2d 31, 34-37 (3d Cir.), *cert. denied,* 429 U. S. 841 (1976); *United States v. Castor,* 558 F. 2d 379 (7th Cir. 1977), *cert. denied,* 46 U. S. L. W. 3436 (U. S. Jan. 9, 1978).

Count 5. Count 5 charged a scheme to defraud Bernstein by inducing him to invest in Chestnut Hill the $6,000 proceeds of a loan from Allstate. The indictment charged that defendants Brown and Greenblatt caused J. L. McGrath of Allstate Finance Company to mail a letter to Bernstein on April 16, 1975.[11] As of March 1, 1975 defendants had succeeded in convincing Bernstein that the loan proceeds would be treated as an investment in Chestnut Hill. On April 8, however, Bernstein disavowed the loan. Soon thereafter, Brown and Greenblatt convinced Bernstein to pay the loan. Accordingly, Bernstein telephoned Allstate and indicated that he would repay the loan. The April 16 letter was Allstate's acknowledgment of the phone call. It indicated that a repayment-coupon book would be forwarded.

The indictment stated merely the April 16 letter was caused to be sent for the purpose of executing the fraud on Bernstein. Appellants argue that the fraud was completed when they received the $6,000 from Bernstein through Allstate. They conclude that mailings occurring after that time were "after the object of the scheme has been accomplished" and thus were not "for the purpose of executing" the fraud. *United States v. Tarnopol, supra,* 561

11. *Quoted at* note 4 *supra.*

F. 2d at 472. They further contend that the letter had no "lulling" function after the money had been received.

Initially we note that appellants' contention that the fraud ended on March 1 finds considerable support in the evidence. By March 1 Brown and Greenblatt had succeeded in convincing their victim to invest additional funds in an illusory interest in the dealership. Bernstein did not become recalcitrant until over a month after the defendants had received the money. *See, e.g., United States v. Maze, supra,* 414 U. S. at 402 (fraud in use of credit card completed when illegitimate user receives services charged on card); *United States v. Britton,* 500 F. 2d 1257, 1259 (8th Cir. 1974) (fraud on insurance company reached fruition when claim check was received). *Cf. United States v. Adamo, supra,* (when merchants participate in credit fraud, scheme continued until bank and credit card companies mailed payment in response to billing).

We are not required to resolve that question in this case. We will assume for purposes of this decision that the government's contention is correct—that the jury could find that the fraud continued past Bernstein's change of heart on April 8 until he was again convinced to allow the money to remain as an investment. Even under that assumption, we do not believe that the evidence supports the conclusion that the mailing on April 16 from Allstate to Bernstein was in furtherance of the fraudulent scheme.

The government's theory of the mail fraud charged in Count 5 has been amorphous and difficult to follow throughout this case. It argues that the letter was in some way connected to a need to convince Bernstein to pay the loan and stop demanding his money back from defendants. We do not believe that the evidence supports the conclusion that the letter from Allstate had any such effect. The letter was sent only after Bernstein had agreed for a second time to pay back the loan. By the time of Bernstein's phone call, he was already convinced; Allstate's letter was only an innocent business confirmation following the phone call. The letter had no relation at all to Bernstein's decision to invest in the automobile dealership.

The government also seems to argue that the letter from Allstate would help to eliminate the threat that Allstate would attempt to recover the money from defendants. Admittedly, a letter which gives the victim of a fraud a false sense of security, and thus induces him to delay recovery of funds, may in some instances support a mail fraud charge. *See, e.g., United States v. Sampson, supra,* 371 U. S. at 80-81; *United States v. LaFerriere, supra,* 546 F. 2d at 187; *United States v. Ashdown,* 509 F. 2d 793, 799 (5th Cir.), *cert. denied,* 423 U. S. 829 (1975). Count 5, however, charges a fraudulent scheme aimed at Bernstein, rather than at Allstate. Even assuming that "lulling" Allstate could support the count, we see no evidence that the confirmatory letter sent by Allstate to Bernstein could have had the effect which the government claims. At the time of the phone call, Bernstein had decided to repay the loan and not to demand the $6,000 back from the defendants. When Allstate received the call, the evidence shows that it considered the loan to be reinstated. The letter merely noted the phone call and indicated that a coupon book would be sent. We do not believe that such a letter had any significant relation to whether Allstate would postpone any attempt to recover the loan proceeds from the defendants.

In summary, we find no evidence that the letter from Allstate to Bernstein was "for the purpose of executing" the scheme to have Bernstein invest in an illusory interest in Chestnut Hill. Since a sufficient relation between the letter and the alleged crime was not shown by the government, we hold that the convictions of both defendants under Count 5 cannot stand.

Count 6. Count 6 alleges that defendants along with Bernstein defrauded Allstate by making a false loan application. Allstate approved the loan and the proceeds were delivered to defendants on February 10, 1975. On March 6 Allstate mailed a repayment coupon book to Bernstein. That mailing formed the basis of the mail fraud charged in the indictment. Appellants argue that the mailing is too remote from the scheme to support their convictions.

Count 6 charged that the defendants caused the coupon book to be mailed for the purpose of executing the scheme to defraud Allstate and "for the further purpose of lulling Allstate into a false sense of security." In its argument before the trial court and on appeal, the government has contended that when Allstate mailed its coupon book, it was "lulled" into delaying any attempt to recover the loan proceeds.

We conclude that the evidence did not show a sufficiently close connection between the mailing and the fraud alleged to support a mail fraud conviction under Count 6. When the check was delivered to defendants and Bernstein on February 10, the perpetrators of the fraud had obtained the fruits of their scheme. They had obtained the use of Allstate's funds under the false pretense that a car purchase was being financed. Allstate's clear purpose in sending a re-payment coupon book was to set up the procedure for repayment of the loan. This mailing had no relation to whether Allstate would discover the actual circumstances under which the money had been obtained and attempt immediately to recover its money. We hold that the relation between the mailing of the coupon book by Allstate and the fraud is too attenuated to support the conviction for mail fraud. *See United States v. Tarnopol, supra,* 561 F. 2d at 472-73 (routine business mailing too remote from fraud); *United States v. Britzman,* 547 F. 2d 380 (7th Cir. 1977).

Count 9. The scheme charged in Count 9 involved the mailing of a request for wholesale financing on April 10, 1975 to Ford Motor Credit Company. The count charged that prior to the mailing, defendants had concocted a scheme to obtain new and used car inventory under Ford's "floor plan" financing, to sell the cars for cash, and to abscond with the cash under the guise of a robbery. The sales and "theft" occurred on April 16. Ford was alleged to be the victim of the scheme to defraud.

Appellants argue that the evidence shows that the scheme, if it ever existed, was not invented until after the April 10 mailing. If that were the case, they correctly conclude that the mail fraud conviction must be reversed. *United States v. Tarnopol, supra,* 561 F. 2d at 472; *United States v. Buckner,* 108 F. 2d 921, 925-26 (2d Cir. 1940), *cert. denied,* 309 U. S. 669 (1941). The jury was explicitly charged that they had to find that the scheme was developed prior to the April 10 mailing before they could return a guilty verdict on Count 9. The evidence in the case showed that defendants were informed on April 2 that Ford would terminate its financing at the end of the month. On April 8 a car was sold to a customer for cash which was paid on April 16, the day of the other cash sales and of the "theft." Further, three of the cars sold on April 16 were financed through the April 10 mailing. We find that there is substantial evidence from which the jury could have concluded that the defendants had developed their scheme before they mailed the April 10 request for financing.

Next appellants contend that our decision in *Tarnopol* requires reversal of their convictions under Count 9. They point to the broad language in the opinion dealing with

"routine business mailings." [12] Brown and Greenblatt argue that the April 10 request for financing was an innocent, routine business procedure of Chestnut Hill and thus cannot support the mail fraud conviction.

We do not believe that *Tarnopol* created a *per se* exception for any mailing which can be regarded as a "routine business mailing." The case merely applied the already established notion that mailings which are too remote from a fraudulent scheme will not support a mail fraud charge. *See United States v. Britzman, supra; United States v. Staszcuk*, 502 F. 2d 875, 881 (7th Cir. 1974), *modified on other grounds*, 517 F. 2d 53 (7th Cir.) (en banc), *cert. denied*, 423 U. S. 837 (1975).

In *Tarnopol* the defendants were charged with a scheme to defraud recording artists, writers, publishers and others. Defendants operated two companies which produced, marketed and sold phonograph records. The scheme consisted of creating a fund from which bribes were paid to radio station personnel so that they would favor defendants' products. The government alleged that defendants used packing slips, mailed from the manufacturer of the records, to further the fraudulent scheme.

12. United States v. Tarnopol, 561 F. 2d 466, 472 (3d Cir. 1977):

> We do not believe that there is a valid distinction to be drawn between those routine mailings which are required by law and those routine mailings, themselves intrinsically innocent, which are regularly employed to carry out a necessary or convenient procedure of a legitimate business enterprise. In either case the mailings themselves are not sufficiently closely related to the fraudulent scheme to support a mail fraud prosecution even though securing the funds received through some of them is the object of the scheme to defraud, as was true [*Parr v. United States*, 363 U. S. 370 (1960), and *United States v. Beall*, 126 F. Supp. 363 (N. D. Cal. 1954)]. *See United States v. Brickey*, 296 F. Supp. 742, 748-49 (E. D. Ark. 1969).

In holding that the mailings charged would not support a mail fraud conviction, the court did not find the fact that the packing slips were routine business mailings to be dispositive. Instead, it ruled that the fraudulent scheme had not commenced with respect to each packing slip until the slip had already been received, and therefore that the mailing was too remote from the fraud. Although the packing slips were used to keep track of sales, including the sales used to create the illegal fund, the court ruled that this use of the slips was for a legitimate business purpose unrelated to the fraud. Lastly, it was observed that the mailing of the slips tended to threaten the success of the fraud, rather than futher it. 561 F. 2d at 473.

Thus, *Tarnopol* determined on the particular facts presented that the purpose of the mailings was not closely connected to the fraudulent scheme. The case did not hold that a "routine business mailing" which is closely bound with the scheme cannot support a mail fraud charge. Similarly, the cases relied upon by Senior Judge Maris did not create a *per se* defense for business mailings, but looked to whether a mailing was too remote from the fraud. *See, United States v. Brickey*, 296 F. Supp. 742 (E. D. Ark. 1969) *aff'd* 426 F. 2d 680 (8th Cir.), *cert. denied*, 400 U. S. 828 (1970); *United States v. Beall*, 126 F. Supp. 363 (N. D. Cal. 1954).

This interpretation of *Tarnopol* is further supported by the several cases which have upheld mail fraud convictions on the basis of a "routine" mailing which was found to be closely connected with a fraudulent scheme. For example, in *United States v. Adamo, supra*, this court held that mailings between merchants and credit card companies by which the merchant received payment for credit card charges supported mail fraud counts where the merchants were involved in a scheme for the use of stolen cards. "Integral to [the merchants'] participation and thus

to the execution of the fraudulent scheme as charged was the continuation of the routine mailings." 543 F. 2d at 35. In *Pereira v. United States,* 347 U. S. 1 (1954), the Supreme Court affirmed a mail fraud conviction supported by mailings sent by banks to collect payment under a check. In *United States v. Maze, supra,* the Court explained that the mailings in *Pereira* "played a significant part in enabling the defendant . . . to acquire dominion over the $35,000, with which he ultimately absconded." 414 U. S. at 401 (footnote omitted). Similarly, inter-bank mailings were held sufficiently related to a "check-kiting" scheme to constitute mail fraud in *United States v. Foshee,* 569 F. 2d 401 (5th Cir. 1978). *Cf. United States v. Marando, supra,* (stock broker confirmations held sufficient).

We do not believe that under these decisions the mere classification of a letter as a "routine business mailing" is a defense to mail fraud. On one hand, evidence may show that a mailing was for the purpose of fulfilling a business or legal procedure unrelated to the fraud and that it was not closely connected with the fraud. In such a case, the mailing is too remote to convert a state law fraud into federal mail fraud, even though the mailing has the incidental effect of assisting the scheme. On the other hand, if the mailing is a part of executing the fraud, or is closely related to the scheme, a mail fraud charge will lie even though the mailing was also related to a business purpose. The relation of the mailing to the fraud is a question of fact.

Turning to Count 9, we hold that there was sufficient evidence for the jury, consistent with its instructions,[13] to

13. The jury was generally instructed that to convict defendants of mail fraud, it must find that defendants perpetrated a scheme in connection with the use of the mails and that they caused the use of the mails in the execution of the scheme. Specifically addressing Count 9, the court pointed out defendants' contention that the April 10 request for financing was merely a normal business occurrence, rather than a part of the scheme intended to defraud Ford. While *Tarnopol,* which was decided after the trial in this case, might suggest a more specific instruction regarding business mailings, no objection was raised to this part of the trial judge's charge and we do not find plain error. *See* F. R. Crim. P. 30; Government of the Virgin Islands v. Navarro, 513 F. 2d 11, 16 (3d Cir.), *cert. denied,* 422 U. S. 1045 (1975).

have found beyond a reasonable doubt that the April 10 request for financing was closely connected with the fraud so as to constitute mail fraud. In early April the dealership was in financial trouble and was informed that Ford Credit would no longer finance inventory after the end of the month. Taking the interpretation of the evidence most favorable to the government, the defendants' scheme was developed at least as of April 8, when a car was sold for cash paid on the day of the robbery. Three of the cars financed through the April 10 mailing were sold on the day of the "robbery." The jury could have concluded that by the time of the April 10 financing request, defendants had ceased to operate Chestnut Hill as a legitimate dealership and were continuing the business in order to bilk Ford. Under that factual conclusion, the April 10 mailing could not even be characterized under *Tarnopol* as a routine mailing of a legitimate business. Even assuming that Chestnut Hill continued as a legitimate business on April 10, the jury could have concluded that the request for financing, although part of a business procedure, was closely connected with the perpetuation of the fraudulent scheme rather than merely incidental to it. Under either assumption, the jury could find that the mailings were "for the purpose of executing" the fraud. Accordingly, the defendants' conviction under Count 9 should be affirmed.

III

Defendants challenge their conviction of extortion and conspiracy under Counts 1 and 2 by arguing that the government's main witness, Wilmerton, lacked believability. Credibility findings are left to the jury as trier of fact and will not be disturbed on appeal. *United States v. Greenlee*, 517 F. 2d 899, 903 (3d Cir.), *cert. denied*, 423 U. S. 985 (1975). The trial judge gave the jury a detailed charge on evaluating the credibility of witnesses, including Wilmerton. Furthermore, Wilmerton's testimony in part was corroborated by the testimony of David Martin.

Next, Brown and Greenblatt contend that if we find that their motion for acquittal under the mail fraud counts should have been granted, we should remand for a new trial on Counts 1 and 2. They reason that the evidence of mail fraud which went to the jury would have a prejudicial impact on the deliberations on the extortion counts. While in some cases such a disposition might be warranted, *see, e.g., United States v. De Cavalcante*, 440 F. 2d 1264, 1275-76 (3d Cir. 1971), we are not presented with such a case here. The evidence of extortion and of mail fraud was sufficiently distinct to support the jury verdict on Counts 1 and 2 free from any taint by the mail fraud evidence. Therefore, our disposition of Counts 5 or 6 does not require reversal of the extortion counts. *See United States v. Dansker*, 537 F. 2d 40, 52 (3d Cir. 1976), *cert. denied*, 429 U. S. 1038 (1977).

IV

Defendants contend that if any of the mail fraud counts are reversed, we are required as a matter of law to reverse the racketeering Counts 13 and 14 as well, under *United States v. Dansker, supra*. In *Dansker*, defendants were charged in one count with a conspiracy having two

objectives. The jury was instructed that it could find defendants guilty on that count if they found a conspiracy to achieve either of the purposes. On appeal, this court concluded that the evidence was insufficient to support a conviction for one of the two objectives. Since it was impossible to determine upon which objective the jury had relied in returning a guilty verdict under the conspiracy count, that verdict was reversed. 537 F. 2d at 51-52. *Accord, United States v. Tarnopol, supra*, 561 F. 2d at 474-75.

Count 13 of the indictment in this case charged defendants with operating their business through a pattern of racketeering activity, 18 U. S. C. § 1962(b). Count 14 charged a conspiracy to commit that offense. The statute defines "pattern of racketeering activity" as requiring "at least two acts of racketeering activity." [14] The district court properly charged the jury that a finding of guilt under any of the substantive counts—1, 5, 6, or 9—could support a conviction under Counts 13 and 14. *See* 18 U. S. C. § 1961(1)(B). Defendants argue that it is impossible to determine upon which two counts the jury relied in returning a guilty verdict under Counts 13 and 14. They conclude that if we reverse any of the other substantive counts, reasoning analogous to that in *Dansker* requires reversal of the racketeering counts. We agree with this position, and note that the government has conceded in its brief that the reasoning of *Dansker* must apply to the charge under section 1962. The jury in this case might have relied on either Counts 5 or 6, for which we have found insufficient evidence in reaching its verdict

14. 18 U. S. C. § 1961(5) (1976):

"pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity . . . .

of guilty under Counts 13 and 14. Accordingly, we must reverse the convictions of both defendants under these two counts.[15]

The judgments of conviction of both defendants under Counts 5, 6, 13 and 14 will be reversed. The defendants' convictions under Counts 1, 2, and 9 will be affirmed. The case will be remanded to the district court for further proceedings consistent with this opinion.

15. Appellant Brown has also raised two issues with respect to the admission of evidence of past criminal acts. He contends that the district court should have granted a mistrial because a government witness testified that Brown was on federal probation for the commission of an unrelated offense. The trial court gave an appropriate instruction at the time the evidence was admitted. We find that the error, if any, was harmless.

Brown also contends that the prosecutor impermissibly cross-examined him regarding the details of a past felony when he took the stand in his own defense. While cross-examination should be limited to the essential facts of a prior crime, no contemporaneous objection was raised to the portion of the examination which Brown challenges on appeal. *See* United States v. Mitchell, 427 F. 2d 644, 647 (3d Cir. 1970). We find no plain error.

JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Nos. 77-2082/77-2083

UNITED STATES OF AMERICA

v.

BROWN, FRANCIS HARRY
aka Harry Brown,
Appellant in No. 77-2082

(D. C. Crim. No. 77-100-1)

UNITED STATES OF AMERICA

v.

GREENBLATT, MARVIN,
Appellant in No. 77-2083

(D. C. Crim. No. 77-100-2)

(D. C. Crim. Nos. 77-100-1 and 2)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Present: ROSENN, HUNTER and HIGGINBOTHAM,
Circuit Judges

JUDGMENT.

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel on June 8, 1978.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgments of the said District Court, filed August 2, 1977, be, and the same are hereby affirmed with respect to the convictions of defendants under Counts 1, 2, and 9; reversed with respect to the convictions of defendants under Counts 5, 6, 13 and 14, and the cause is remanded to the district court for further proceedings consistent with the opinion of this Court.

August 14, 1978

ORDER OF THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 77-2082/3

UNITED STATES OF AMERICA,
Appellee,

v.

BROWN, FRANCIS HARRY,
aka HARRY BROWN

GREENBLATT, MARVIN,
Appellants

ORDER SUR PETITION FOR REHEARING.

Present: ROSENN, HUNTER and HIGGINBOTHAM,
Circuit Judges

The petition for rehearing filed by Appellants in the above entitled case having been submitted to the judges who participated in the decision of this court, and no judge who concurred in the decision having asked for rehearing, the petition for rehearing is denied.

By THE COURT,

/s/ JAMES HUNTER, III
James Hunter, III,
Circuit Judge.

Dated: October 13, 1978